

3.7 Deliberations and Report

3.7.1 Deliberations

After the hearing is closed, the DRB meets privately to discuss the dispute and reach a recommendation. If all three members have generally similar conclusions, the main effort will be directed toward composing the report. If not, one or more sessions may be held to reconcile differences. DRB deliberations can be conducted at any convenient location. Care should be exercised to ensure privacy.

In order to ensure timely completion of the report, the DRB may prepare a schedule covering all anticipated steps to complete its deliberations and prepare its report, taking into account other commitments of the individual members.

Basic objectives of the deliberations include:

- Finding and agreeing on the pertinent facts
- Reaching agreement on interpretation of the pertinent contract requirements
- Agreeing on the DRB's position with respect to the issues, questions, and disputes posed by the parties in the referral
- Composing the report so that the recommendation and the supporting rationale are straightforward and easy to understand.

If time allows and Board members are available, initial deliberations are held and an outline of the report is prepared immediately after the hearing. Later, drafts of the report are exchanged by facsimile or e-mail, followed by telephone conference discussions until agreement is reached. The Chair should take the lead in organizing these activities and keeping them on schedule.

Details of the dispute must never be discussed outside the DRB deliberations.

If, during the deliberations, the need arises for additional information, such as copies of documents not in the DRB's possession, a request may be made to either party with a copy of the request to the other party. The additional information is provided to the other party as well as the DRB. The DRB must not consider additional information in support of or against either party without both parties having the opportunity to address the additional information.

3.7.2 Report and Recommendations

Recommendations must be based on the information presented by the parties and must be compatible with all applicable provisions of the contract, the facts and circumstances related to the dispute and applicable laws and regulations. It is most important that the Board members be familiar with and thoroughly consider all applicable provisions of the contract when preparing their report. Depending on the facts and circumstances, the DRB may need to consider relevant industry practice and standards in developing its findings and conclusions. However, the DRB must not ignore any provision of the contract documents, even if not discussed by either party.

DRBs must not recommend a compromise settlement according to what they believe would be acceptable to both the parties. It is essential that all recommendations be based solely on the provisions of the contract, the facts of the dispute and applicable laws and regulations. Any

recommendation that is not consistent with the contract language, facts, and circumstances of the dispute will likely undermine the credibility of the DRB.

In some cases, various provisions of the contract may be perceived by some of the Board members as unfair to one of the parties. Individual notions of “fairness” or “equity” are not part of the contract, and have no place in the DRB process. Relief from an unfair contract is with the courts.

The DRB must limit its recommendations and reports to the issues in dispute. The parties, and not the DRB, determine which issues are referred to the DRB.

The parties may pose questions to the DRB in their position papers. Well-considered answers to these questions may be critical to the resolution of the dispute. The DRB should endeavor to respond to such questions, to the extent reasonable and necessary.

Even when the DRB has initially been asked to address only entitlement, later if both parties agree the DRB may include suggested guidelines for resolving quantum.

While drafting the report, it should be kept in mind that reports are usually non-binding. The DRB must therefore strive to convince both parties of the wisdom and benefits of accepting the report. This is best accomplished by demonstrating that all points raised in the position papers and at the hearing have been considered. Every important point of each party's position should be summarized, both points accepted as well as those rejected by the DRB. The DRB's logic and line of reasoning should be fully explained, in a clear and logical sequence that both parties can fully understand and accept. Do not disparage either party's positions or presentations.

Reports should neither be extremely brief, with little explanation, nor long and wordy, with pages of material having little relevance to the basic issues in dispute. Both of these extremes should be avoided. The report should be concise, yet detailed enough for a member of either party, including those unfamiliar with the dispute, to adequately understand the issue, the positions of the parties and the reasoning supporting the recommendations of the DRB. The report must be professional, objective and impersonal.

It is often helpful to include a chronology of the events associated with and leading to the dispute, and a listing of the particular sections of the contract cited by each party in support of their position.

Writing to convince an owner's board of directors or other decision makers not present at the hearing, must be more thorough and detailed than might be necessary to convince the project personnel alone, or the head of the contractor firm. All disputes, particularly those involving large dollar amounts and disputes that could result in arbitration or litigation, deserve a thorough, detailed and convincing report, bearing in mind that the DRB report will almost certainly be admissible as evidence in any subsequent proceedings.

One Board member is usually delegated to assemble the first draft of the report. For complex disputes having several different issues, this work may be divided among the members. The first draft is circulated among the members for comments and revisions. This process is continued, with the wording of all elements carefully considered until the document is finalized.

In extremely complex disputes, especially when the parties disagree on many facts and when disputes involve many documents, the DRB may wish to issue a draft of its understanding of the positions of the parties and facts of the dispute, not including the recommendations, prior to preparing its complete report. Time for review by the parties should be limited. Establish a deadline for the parties to submit their comments after conferring with them.

3.7.3 Minority Reports

The goal is always to produce a unanimous report. By thoroughly reviewing and exploring one another's perspectives and by reasonable compromise, the members can almost always prepare a report acceptable to all.

Dissenting opinions are discouraged and should be offered only when the dissenting member strongly disagrees with the majority opinion. Keep in mind that a dissenting opinion may undermine the entire DRB process on the project, especially the aspect of resolving issues before they become disputes. If, however, in spite of their best efforts, the DRB is unable to reach a unanimous conclusion, the dissenting member, preferably with input for the other Board members, prepares a minority position with supporting rationale. This is included with the majority report.

Whether the report is signed so as to identify the dissenting member depends on the circumstances of the dissent and is up to the DRB. This decision deserves careful consideration.

- On one hand, if the dissenting member is identified and was nominated by the party that did not prevail, that party may be more likely to reject the report.
- On the other hand, if the DRB has established a policy of not identifying the dissenting member, the ability of the other Board members to convince the reluctant member to accept the majority opinion is diminished.

The DRB's policy on identifying the dissenting member must be decided for each dispute, taking into account the above considerations.

3.7.4 Delivering the Report

A common practice is to prepare and sign the signature page and later, when the report is complete, attach it and submit it by facsimile, mail or overnight delivery to the parties. This page should have identifying material at the top such as the dispute number and name. An alternative practice is to simultaneously transmit an unsigned copy by facsimile or e-mail to the parties, with the record copies circulated by mail to the other Board members for signatures and then sent on by mail to the parties. Another method, by agreement of all parties, is for the Chair to sign the report: "FOR AND WITH THE CONCURRENCE OF ALL MEMBERS."

3.7.5 Acceptance/Rejection

In choosing to accept or reject a recommendation, the parties look primarily at the rationale expressed in the report. If the rationale does not adequately support the recommendation, the parties are not likely to accept it.

When a party does not accept a DRB recommendation, the dispute may continue on to other venues for resolution. However, the parties almost always continue their negotiations using the DRB report as a guide, and those negotiations are usually successful.

3.7.6 Clarifications

Detailed requests for clarification of specific elements of a DRB report can be made by either party and should be made in writing within the contractually specified time period following receipt of the report, with a copy of the request going to the other party.

Sometimes a party is honestly unable to understand the rationale for a recommendation and thus has a legitimate basis for seeking clarification. Occasionally what was believed to be agreement on a factual matter turns out to be incorrect and clarification is needed. The DRB may only need to address specific questions for the parties to become convinced to accept the report. The DRB should respond in writing to any requests for clarification.

Clarifications should be completed as quickly as possible. It is common to specify that clarification requests be submitted within 10 days, and for the DRB to respond within a similar time frame.

Occasionally a party will submit what it considers to be a request for clarification, but which in reality is nothing more than an attempt to re-argue the dispute. DRBs should tactfully decline to be drawn into an argument with either party about whether the DRB correctly decided the dispute or not.

Each party should be permitted to submit only one request for clarification of any individual DRB report.

3.7.7 Reconsideration or Appeal to the DRB

Reconsideration should be the exception, not the rule. The standards, criteria and time frame for reconsideration should be set forth in the DRB specification; if they are not, they should be established by the DRB in the Operating Procedures. Reconsideration should only be based on evidence not available prior to or during the hearing. A valid request for reconsideration depends on submission of new evidence or a reasonable demonstration that the DRB misunderstood or failed to consider pertinent facts of the dispute. The DRB should honor a request for reconsideration only when reconsideration is justified. If one party submits new evidence to the DRB, the other party must be given an opportunity to review and respond to that evidence before the DRB determines whether reconsideration of its report is warranted.

Reconsideration should not be granted simply because one party either

- doesn't like the report,
- wants to portray evidence in a different way,
- wants to present information that was available but not offered at the hearing,
- or to assert an additional argument.

Rearguing the same issue on the same facts is not productive and the DRB should respectfully decline to reconsider the recommendation.

Each party should be permitted only one request for reconsideration for each DRB report.

Usually, an additional hearing is not needed. The DRB reviews any new evidence together with commentary from the parties and, if necessary, prepares a clarified or revised report that responds to the issues raised.